No. 94-558, -627

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES,

Appellant,

AND

STATE OF LOUISIANA, *et al.*,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

On Appeals from the United States District Court for the Western District of Louisiana

BRIEF OF BERNADINE ST. CYR, HAZEL J. FREEMAN, DONALD THIBODEAX, PARTICK FONTENONT, JANICE FRAZIER, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE LOUISIANA LEGISLATIVE BLACK CAUCUS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 2

ARGUMENT

Introduction 3

THE UNCONTROVERTIBLE HISTORY OF DISCRIMINATION AGAINST AFRICAN AMERICANS IN LOUISIANA, THE REPEATED DILUTION OF THEIR VOTING STRENGTH, AND THE PERSISTENCE OF WHITE BLOC VOTING, AMPLY JUSTIFIED THE CHALLENGED DISTRICTING PLAN 5

A. The History of Egregious Discrimination against African Americans in Louisiana 6

1. Discrimination in voting 7

2. Discrimination in education and other areas 12

3. Continuing impact of this discrimination 14

TABLE OF CONTENTS (continued)

Page

B. The State's Consistent Dilution of African-American Voting Strength in the Drawing of Districts 16

C. The Persistence of Racially Polarized Voting 22

D. The "Totality of the Circumstances" . . 25

Conclusion 28

Table of Authorities

Cases:

Anderson v. Martin, 375 U.S. 399 (1964) 9

Brown v. Board of Education, 347 U.S. 483 (1954) 9, 13

Bussie v. Governor of Louisiana, 333 F. Supp. 452 (E.D. La. 1971), aff'd and modified, 457 F.2d 796 (5th Cir. 1971), vacated sub nom. Taylor v. McKeithen, 407 U.S. 191 (1972), on remand, 499 F.2d 893 (5th Cir. 1974) 16

Table of Authorities (continued)

Page

Cases (continued):

Chisom v. Edwards, 690 F. Supp. 1524 (E.D. La. 1988), vacated, 853 F.2d 1186 (5th Cir.), cert. denied, 488 U.S. 955 (1988) 12

Chisom v. Roemer, 501 U.S. ___, 115 L. Ed. 2d 348 (1991) 2

Citizens for a Better Gretna v. City of Gretna, 636 F. Supp. 1113 (E.D. La. 1986), aff'd, 834 F.2d 496 (5th Cir. 1987), cert. denied, 492 U.S. 905 (1989) 12

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 5, 26

Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988), vacated sub nom. Clark v. Roemer, 750 F. Supp. 200 (M.D. La. 1990), modified, 777 F. Supp. 445 (M.D. La. 1990), vacated, 501 U.S. 1246 (1991), on remand, 777 F. Supp. 471 (M.D. La. 1991), appeal dismissed, 958 F.2d 614 (5th Cir. 1992) 11n, 12, 15, 23, 25, 26

Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 1991), appeal dismissed, 958 F.2d 614 (5th Cir. 1992) 26n

Guinn v. United States, 238 U.S. 347 (1915) 8n

Table of Authorities (continued)

Page

Cases (continued):

Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), cert. denied, 396 U.S. 904 (1969) 13n

Houston Lawyers Association v. Attorney General of Texas, 501 U.S. ___, 115 L. Ed. 2d 379 (1991) 2

International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 24n

Johnson v. DeGrandy, ___ U.S. ___, 129 L. Ed. 2d 775 (1994) 6n, 25

Lane v. Wilson, 307 U.S. 268 (1939) 4n

Louisiana v. United States, 380 U.S. 145 (1965) 7, 9, 10

Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) . . . . . *passim*

NAACP v. Button, 371 U.S. 415 (1963) 2

Parnell v. Rapides Parish School Bd., 425 F. Supp. 399 (W.D. La. 1976), aff'd in part, 563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978) 11n

Table of Authorities (continued)

Page

Cases (continued):

Planned Parenthood v. Casey, 505 U.S. ___, 120 L. Ed. 2d 674 (1992) 29

Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968) 11-12, 13

Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 26

Shaw v. Reno, 509 U.S. ___, 125 L. Ed. 2d 511 (1993) 29

Smith v. Allwright, 321 U.S. 649 (1944) 9

Thornburg v. Gingles, 478 U.S. 30 (1986) 2, 28

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 2

United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965) 7n, 8n, 9, 10

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), aff'd sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) 6n, 11n

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Page

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Alcee Fortier, History of Louisiana (1904) 8n

Louisiana Act 538 of 1960 9

Alice Love, *David Duke Wants to Run for New Cajun House Seat*, 39 Roll Call, August 4, 1994 14

1978 Almanac of American Politics 19n

Nomination of William Bradford Reynolds to be Associate Attorney General of the United States; *Hearings Before the Senate Committee on the Judiciary*, 99th Cong. 1st Sess. (1985) 20n

Lawrence N. Powell, *Read My Liposuction: The Makeover of David Duke*, 203 New Republic 18 (Oct. 15, 1990) 14n

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Page

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INTEREST OF *AMICI CURIAE*[1]

Bernadine St. Cyr, Hazel J. Freeman, Donald Thibodeax, Patrick Fontenot, and Janice Frazier are African-

[1]Letters consenting to the submission of this brief have been filed with the Clerk of this Court.

American voters residing in the State of Louisiana. The Louisiana Legislative Black Caucus includes the African-American members of the Louisiana Legislature, all of whom are elected representatives and voters of the State of Louisiana, and many of whom reside in the present Fourth Congressional District. The Caucus supported the creation of the current Fourth Congressional District, a position joined by a majority of Louisiana's elected legislature, including both white and African-American legislators. These individual voters and the Caucus sought to intervene in the District Court to protect the interest of voters in a reapportionment plan that complied with the requirements of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the Constitution of the United States, but that intervention was denied. The NAACP Legal Defense and Educational Fund, Inc. ("the Fund") is a non-profit corporation that was established for the purpose of assisting African Americans in securing their constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. *See, e.g., United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991); *Houston Lawyers Association v. Attorney General of Texas*, 501 U.S. ___, 115 L. Ed. 2d 379 (1991).

SUMMARY OF ARGUMENT

Contrary to the opinion of the court below, there is an extensive, indisputable legal and factual basis supporting the Louisiana Legislature's conclusion, following the 1990 census, that compliance with the Voting Rights Act of 1965 required it to fashion a Congressional redistricting plan with

two African-American-majority districts. Far from being pretextual (as the court below suggested), this conclusion is compelled in light of (a) the state's long history of official discrimination against its African-American citizens (including restrictions upon their exercise of the franchise and neutralization of their voting strength); (b) the repeated invalidation, by federal courts or as a result of objections lodged by the Attorney General of the United States pursuant to Section 5 of the Act, of redistricting plans that had been adopted by the legislature because those plans were found to deny Black voters an equal opportunity to participate in the political process and to elect candidates of their choice to a variety of offices; and (c) the continued existence of white bloc voting against African-American candidates in Louisiana elections.

ARGUMENT

INTRODUCTION

Amici Curiae are African-American voters of the State of Louisiana, the Louisiana Legislative Black Caucus, and the NAACP Legal Defense and Educational Fund, Inc., which represents the individual *amici* here as well as voters in North Carolina, Texas, and Georgia[2] who have intervened in suits that seek to attack majority-African-American and -Hispanic-American Congressional districts in those states. In Louisiana, as in each of these states, the purposeful creation of majority-minority districts arises in a specific historical context which the court below should have, but did not, adequately take into account in its decision.

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[2]*See Shaw v. Hunt*, Nos. 94-923, -924; *Lawson v. Vera*, Nos. 94-805, -806, -988; and *Johnson v. Miller*, Nos. 94-631, -797, -929, respectively.

There are two primary aspects to this context. *First*, each of these states has a long and shameful history of denying minority citizens the right to vote through a wide variety of devices and means, both "sophisticated and simple-minded."[3] *Second*, in each of these states it is still true that large numbers of white voters consistently do not vote for African-American or other minority candidates. Such white bloc voting has made it virtually impossible for minority candidates, whatever their qualifications or merit, to win an election in a district in which minority voters are not a majority of the electorate.

The creation of majority-minority districts was necessary to correct these evils and to provide African Americans and other minority voters with a fair chance to elect officeholders of their choice to the legislative body intended by the Constitution to be representative of the people as a whole. The post-1990 census Congressional redistricting plans enacted by the Louisiana legislature and signed by Louisiana Governor Edwin Edwards in 1992 and 1994 are directly responsible for dismantling the barriers to full participation in the election of members of Congress that have confronted Louisiana's African-American population since the end of Reconstruction.[4]

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[3]*Lane v. Wilson*, 307 U.S. 268, 275 (1939).

[4]United States Representative William J. Jefferson of New Orleans, who has represented Louisiana's Second Congressional District since 1991, was elected from a majority-Black Congressional district created following a federal district court's finding that the construction of the New Orleans area districts in the state's post-1980 census Congressional redistricting plan violated Black voters' rights to participate equally in the electoral process and to enjoy an equal opportunity to elect candidates of their choice to Congress. *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court). Before Jefferson's election in 1990, the last African-American member of Congress from Louisiana was Charles Edmund Nash, who was elected

The present case, and others that are now pending and that will surely follow if this Court permits the result below to stand, have as their purpose the undoing of our society's hard-won progress toward democratic electoral processes open to all citizens. If successful, the inevitable effect of these cases would be to turn the clock back to a day when the voices of minority citizens were unheard in legislative halls, and when the only avenue open to them was that of protest and demonstration. That would be the antithesis of the truly color-blind society to which this Court has repeatedly and consistently committed itself.

THE UNCONTROVERTIBLE HISTORY OF DISCRIMINATION AGAINST AFRICAN AMERICANS IN LOUISIANA, THE REPEATED DILUTION OF THEIR VOTING STRENGTH, AND THE PERSISTENCE OF WHITE BLOC VOTING, AMPLY JUSTIFIED THE CHALLENGED DISTRICTING PLAN

The district court properly held that "[a]dhering to federal anti-discrimination laws and remedying past or continuing discrimination could constitute compelling governmental interests [for the adoption of Louisiana's post-1990 census Congressional redistricting plans] if the State could 'demonstrate a strong basis in evidence for its conclusion that remedial action was necessary.'" *Hays v. Louisiana*, US J.S. App. at 7a (*quoting City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989)). The district court erred, however, in finding that the adoption of Act

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in 1874 and served one term. Bruce A. Ragsdale and Joel D. Treese, BLACK AMERICANS IN CONGRESS, 1870-1989 101-02 (1990). Congressman Cleo Fields of Baton Rouge, United States Representative for Louisiana's Fourth Congressional District, which was invalidated by the court below, was initially elected in 1992.

1 was unjustified under these standards. Instead, in complete disregard of the record before it and in contravention of this Court's decisions,[5] the district court characterized the adoption of Act 1 as "[u]sing the disease as a cure" and struck down Louisiana's remedial efforts. *Id.* at 124-25.

There was ample justification for the Louisiana Legislature's decision to enact a Congressional apportionment plan with two majority-African-American districts, in light of the historical and current factual context in which it acted: pervasive discrimination against African Americans in Louisiana,[6] the state's repeated practice of drawing electoral districts that diluted African-American voting strength, and the continued existence of bloc voting by whites against African-American candidates.

A. *The History of Egregious Discrimination against African Americans in Louisiana*

For centuries, the African-American population of Louisiana was subjected to the most blatant, pervasive,

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[5]*See, e.g., Johnson v. DeGrandy*, ___ U.S. ___, ___, 129 L. Ed. 2d 775, 796 (1994) ("[T]he lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity").

[6]*Cf. Major v. Treen*, 574 F. Supp. at 351 ("Evidence of 'past discrimination' . . . is relevant insofar as it impacts adversely on a minority group's present opportunities to participate in government"); *Zimmer v. McKeithen*, 485 F.2d 1297, 1306 (5th Cir. 1973) (*en banc*) ("The district court concluded that . . . removal [of impediments to registration and the elimination of *de jure* school segregation] vitiated the significance of the showing of past discrimination. This conclusion is untenable, however, precisely because the debilitating effects of these impediments do persist"), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

and debilitating forms of discrimination, including a complete denial of voting rights, solely on the basis of race.[7]

1. *Discrimination in voting*

Neither enslaved nor free persons of color were allowed to vote in Louisiana until after the Civil War.[8] Following the Civil War, African Americans in Louisiana were afforded their first opportunity to participate in the electoral process. By 1898, "approximately 44% of all the registered voters in the State were Negroes," *Louisiana v. United States*, 380 U.S. 145, 147 (1965). Inclusion of African Americans in the political process in Louisiana was only temporary, however, and by the turn of the century, they were almost completely excluded from political participation in the state.[9]

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[7]Even before Louisiana became a state in 1812, racially-based exclusion from the political process was in place. "[T]he *Codes Noir*, from the 1724 Code to Act 83 of the Territorial Legislature of 1806, disfranchised Negroes." *United States v. Louisiana*, 225 F. Supp. 353, 363 (E.D. La. 1963) (three-judge court), *aff'd*, 380 U.S. 145 (1965). "The Louisiana Constitution of 1868 [adopted during Reconstruction] for the first time permitted Negroes to vote. La. Const. 1868, Art. 98." *Louisiana v. United States*, 380 U.S. 145, 148 n.5 (1965).

[8]*See* Article II, Section 8 of Louisiana Constitution of 1812, restricting right to vote to "free white male" members of the population. "[D]uring the era of slavery . . . the franchise was conferred exclusively upon white males." *Major v. Treen*, 574 F. Supp. at 340; *see United States v. Louisiana*, 225 F. Supp. at 363.

[9]Between 1896 and 1907 the number of Black registered voters in Louisiana plummeted from approximately 135,000 to fewer than 1,000 statewide. *Major v. Treen*, 574 F. Supp. at 340. In an address to the Legislature following the 1898 Louisiana Constitutional Convention, Governor Murphy J. Foster stated:

> The white supremacy for which we have so long struggled . . . is now crystallized into the Constitution as a fundamental

Without exception, Louisiana employed every electoral device ultimately condemned by this Court as violative of African Americans' right to equal political participation. These included the "grandfather" clause,[10] the white primary,[11] and the "interpretation" test.[12]

> part and parcel of that organic instrument . . . With this great principle thus firmly imbedded in the Constitution, and honestly enforced, there need be no longer any fear as to the honesty and purity of our future elections.

United States v. Louisiana, 225 F. Supp. at 374.

[10]According to a contemporaneous publication, Louisiana's "grandfather" clause was adopted "'to allow many honorable and intelligent but illiterate white men to retain the right of suffrage, and the purpose of the educational or property qualification[s] was to disfranchise the ignorant negroes who had been a menace to the civilization of the State.'" *United States v. Louisiana*, 225 F. Supp. at 373 (*quoting* 4 Alcee Fortier, HISTORY OF LOUISIANA 235 (1904)).

[11]Soon after this Court invalidated Oklahoma's (and, necessarily, Louisiana's) "grandfather" clause in *Guinn v. United States*, 238 U.S. 347 (1915), Louisiana responded to the decision by, *inter alia*, authorizing political parties to conduct racially exclusive primary elections. Louisiana's white primary, "which functioned to deny blacks access to the determinative elections . . . persisted until its condemnation in *Smith v. Allwright*, 321 U.S. 649 (1944)." *Major v. Treen*, 574 F. Supp. at 340.

[12]*See generally United States v. Louisiana*, *supra* note 7. Circuit Judge John Minor Wisdom, writing for the majority of the three-judge court that originally invalidated Louisiana's "interpretation" test, wrote:

> A wall stands in Louisiana between registered voters and unregistered, eligible Negro voters. The wall is the State constitutional requirement that an applicant for registration 'understand and give a reasonable interpretation of any section' of the Constitutions of Louisiana or of the United States. It is not the only wall of its kind, but since the Supreme Court's demolishment of the white primary, the interpretation test has been the highest, best-guarded, most

A series of other "disenfranchisement techniques implemented by the state," including poll taxes, registration purges, literacy tests, citizenship tests, and laws prohibiting "single shot" voting, "suppressed black political involvement [in Louisiana] until banned by Congress in 1965," *Major v. Treen*, 574 F. Supp. at 340, or invalidated by federal courts, *see, e.g.*, *Anderson v. Martin*, 375 U.S. 399 (1964) (invalidating La. Act 538 of 1960, which required the race of candidates to be included on ballots).

In *Louisiana v. United States*, 380 U.S. 145 (1965), this Court unanimously affirmed the decision of a Louisiana federal court invalidating many of the racially discriminatory barriers to voter registration that had been erected by the state. There, the Court noted that an increase in Black voter registration (following the demise of the white primary after the *Smith v. Allwright* decision), coupled with the advent of school desegregation (following this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)), prompted the Louisiana Legislature to create "a committee which became known as the 'Segregation Committee.'" 380 U.S. at 149. The Louisiana Legislature's Segregation Committee was responsible for developing and implementing efforts "to preserve white supremacy." *Id.* Among the more effective means of achieving the goal of "preserv[ation of] white supremacy" in the political process was the "interpretation" test, *United States v. Louisiana*, 225 F. Supp. at 380-81.[13]

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effective barrier to Negro voting in Louisiana." *United States v. Louisiana*, 225 F. Supp. at 355.

[13]The "interpretation" test "required that an applicant for registration be able to 'give a reasonable interpretation' of any clause

In the two decades following this Court's invalidation of the white primary, the renewed administration of the "interpretation" test transformed Louisiana's voter registration offices into "'the front line of the battle' to retain a segregated society." *United States v. Louisiana*, 225 F. Supp. at 387. Registrars in 21 of Louisiana's 64 parishes discriminated against African-Americans who attempted to register to vote "not as isolated or accidental or unpredictable acts of unfairness by particular individuals, but *as a matter of state policy* in a pattern based on the regular, consistent, predictable unequal application of the [interpretation] test." *Id.* at 381 (emphasis supplied).[14]

After this Court's affirmance of the decision invalidating Louisiana's racially discriminatory "interpretation" test and other voter registration practices in *Louisiana v. United States*,[15] and Congress' adoption

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in the Louisiana Constitution or the Constitution of the United States." *Louisiana v. United States*, 380 U.S. at 148.

[14]Red River, DeSoto and Rapides Parishes, which are wholly or partially within District 4 of Act 1, were among the parishes where the interpretation test was used to thwart Black voter registration efforts; indeed, Red River Parish was specially identified by the three-judge court as one of the areas where "[t]he evidence of discriminatory application of the interpretation test [wa]s especially well documented and supported by testimony," *United States v. Louisiana*, 225 F. Supp. at 381 and n.77; *see also*, *id.* at 385 (table listing Black and white voting age population and registration in those parishes in 1956 and 1960).

[15]Louisiana's "citizenship test," which required applicants for registration to pass an "'objective test of citizenship'" and demonstrate that they were "'of good character and . . . [aware of] the duties and obligations of citizenship," was also challenged in *United States v. Louisiana*. The court entered a more limited injunction against use of the citizenship test than the complete statewide prohibition it imposed against further use of the interpretation test. *See* 225 F. Supp. at 392-98.

of the Voting Rights Act of 1965, increasingly subtle, but nevertheless effective, mechanisms for diluting African-American voting strength and counteracting African Americans' increasing access to the ballot surfaced throughout the state. The use of at-large or multimember district elections,[16] the majority-vote requirement,[17] and other election procedures and devices[18] combined with pervasive racially polarized voting throughout Louisiana to minimize the voting strength of the recently registered African-American population in the state.

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[16]*See, e.g., Zimmer v. McKeithen*, *supra* note 6 (invalidating multimember election districts in East Carroll Parish); *Parnell v. Rapides Parish School Bd.*, 425 F. Supp. 399 (W.D. La. 1976), *aff'd in relevant part*, 563 F.2d 180 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (same for Rapides Parish). *See generally*, Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, and Victoria M. Caridas-Butterworth, *Louisiana*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990 109-17 (Chandler Davidson and Bernard Grofman, eds., 1994)("Engstrom, *et al.*"); U. S. Exh. 9, *Hays v. Louisiana*, at 10-13 (listing court decisions and numerous Justice Department Section 5 objections to changes from single-member to multimember election districts in Louisiana, as well as to racially discriminatory single-member redistricting plans adopted by Louisiana jurisdictions in the 1970's).

[17]*See Zimmer*, 485 F.2d at 1306 (noting that the majority-vote requirement "has been severely criticized as tending to submerge a political or racial minority," and holding that it in fact had that result in East Carroll Parish).

[18]*See, e.g., Clark v. Edwards*, 725 F. Supp. 285, 301 (M.D. La. 1988) (noting that "[t]he requirement that each judicial candidate qualify to a specific post or division . . . limit[s] the ability of black voters to select candidates of their choice. . . . [T]he run-by division requirement in judicial elections is a functional equivalent [to an anti-single shot voting provision]"), *vacated on other grounds sub nom. Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990), *modified* , 777 F. Supp. 445 (M.D. La. 1990), *vacated*, 501 U.S. 1246 (1991), *on remand*, 777 F. Supp. 471 (M.D. La. 1991), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992).

Louisiana's "long history of de jure and de facto restrictions on the right of black citizens to register, to vote, and otherwise participate in the democratic process" is so notorious that within the past decade, Louisiana federal courts have "taken judicial notice of that history," *Clark v. Edwards*, *supra* note 18; *see also Chisom v. Edwards*, 690 F. Supp. 1524, 1534 (E.D. La. 1988) (same), *vacated on other grounds*, 853 F.2d 1186 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988); *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1116 (E.D. La. 1986) ("The historical record of discrimination in the State of Louisiana and the Parish of Jefferson is undeniably clear, and the record suggests it has not ended even now"), *aff'd*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989).

2. *Discrimination in education and other areas*

One federal district court observed in a 1983 case that the discrimination African-American residents of Louisiana encountered outside the political arena was as pervasive and severe as that encountered within the political realm:

> Like other southern states, Louisiana enforced a policy of racial segregation in public education, transportation and accommodations. Despite the Supreme Court's ruling in *Brown v. Board of Education* . . . local school boards refused to desegregate in the absence of a federal court order. . . . A dual university was operated by the state until 1981, when it was dismantled pursuant to a consent decree. . . . [and p]ublic facilities were not open to members of both races until the late 1960s.

Major v. Treen, 574 F. Supp. at 341 (citation omitted); *see also Poindexter v. Louisiana Financial Assistance Comm'n*,

275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) (detailing widespread resistance to school desegregation throughout Louisiana for more than a decade following the *Brown* decision, largely facilitated by a series of legislative enactments designed to evade the effect of that ruling).[19]

Testimony before the court below underscores the *Major v. Treen* panel's assessment of the pervasiveness of state-enforced segregation in Louisiana. One of the more telling examples of this was the testimony of a white state Senator about the leadership role that African-American members of the legislature played in the effort to repeal state laws that required human blood to be identified according to the race of the donor, and kept segregated. Armand J. Brinkhaus (a member of the legislature since 1968) testified that Ernest "Dutch" Morial, who was then the lone African-American member of the entire Louisiana legislature, "fought a battle on a bill . . . to mandate a discontinuance of [racial] labeling [of] blood." June 22, 1994 Tr., Vol. 4, at 24, 25. According to Senator Brinkhaus, the bill introduced by then-Representative

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[19]As the *Poindexter* court summarized:

> [F]or a hundred years, the Louisiana legislature has not deviated from its objective of maintaining segregated schools for white children. . . . Open legislative defiance of desegregation orders shifted to subtle forms of circumvention . . . [b]ut *the changes in means reflect no change in legislative ends.*

275 F. Supp. at 845 (emphasis supplied). *See also Hall v. St. Helena Parish School Bd.*, 417 F.2d 801 (5th Cir.) (holding that 37 Louisiana school boards, including those for the present Fourth Congressional District parishes of Ascension, Desoto, Natchitoches, Pointe Coupee, Rapides, St. Landry, St. Martin and West Baton Rouge were required to eliminate continued school segregation through some means other than ineffective "freedom of choice" policies), *cert. denied*, 396 U.S. 904 (1969).

Morial was not enacted in 1968 and did not pass until "the numbers [of African-American legislators] increased," *id.* at 25.[20]

In the 1993 evidentiary hearing before the court below on the constitutionality of Louisiana Act 42 (the first post-1990 census Congressional redistricting plan invalidated by the court below), Tulane University history professor Lawrence Powell testified that "Louisiana was the only state in which Black illiteracy remained above 70 percent throughout the 19th Century . . . [and] from the late 1880s until the mid-1920s Louisiana was second only to Mississippi in lynching." Aug. 19, 1993 Tr. at 55.

3. *Continuing impact of this discrimination*

While the enactment and enforcement of civil rights laws has afforded African Americans some relief from racial discrimination in Louisiana and elsewhere, as the district court found in the 1983 *Major v. Treen* decision, Louisiana's long-lived discriminatory practices have had, unfortunately, similarly long-lived effects:

> [T]he residual effects of past discrimination still impede blacks from registering, voting or seeking elective office. . . . Blacks in contemporary Louisiana have less education, subsist under poorer living conditions and in general occupy a lower socio-economic status than whites. Though

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[20] *Cf.* Lawrence N. Powell, *Read My Liposuction: The Makeover of David Duke*, 203 NEW REPUBLIC 18 (Oct. 15, 1990) (in a 1990 debate with United States senatorial campaign opponent Ben Bagert, David Duke "admitted that he still believes that the blood supply should be racially segregated"). After the court below invalidated Act 1 and imposed its own districting plan, David Duke announced his intention to run for the United States Congress from Louisiana. See Alice Love, *David Duke Wants to Run for New Cajun House Seat*, 39 ROLL CALL, August 4, 1994, at 1.

> frequently more subtle, employment discrimination endures. These factors are the legacy of historical discrimination in the areas of education, employment and housing. . . . A sense of futility engendered by the pervasiveness of prior discrimination, both public and private, is perceived as discouraging blacks from entering into the governmental process.

574 F. Supp. at 341. More recently, Chief Judge John V. Parker of the Middle District of Louisiana reached a similar conclusion and rejected the state defendants' argument that official acts of discrimination which occurred before the enactment of the Voting Rights Act in 1965 are irrelevant to determining whether a challenged electoral practice discriminates against African-American voters. Chief Judge Parker held that "[t]he *entire* history of discrimination must be considered although . . . there have been improvements made by virtue of the Voting Rights Act of 1965." *Clark v. Edwards*, 725 F. Supp. at 296 (emphasis supplied). Judge Parker found that Louisiana's "'history of racial discrimination, both de jure and de facto, continues to have an adverse effect of the abilities of its black residents to participate fully in the electoral process.'" *Id.* (quoting *Major v. Treen*).

The court below concluded that the Louisiana Legislature lacked any basis for believing that if it failed to adopt a Congressional districting plan containing two districts that would afford African Americans an equal opportunity to elect candidates of their choice, the Attorney General would interpose a Section 5 objection or African-American voters would bring a successful Section 2 suit challenging the plan. The court's conclusion is simply untenable in light of the extensive history and continuing adverse impact of decades of state-

sponsored discrimination against the African-American citizens of the State of Louisiana.

B. *The State's Consistent Dilution of African-American Voting Strength in the Drawing of Districts*

In every post-census redistricting undertaken by the Louisiana Legislature since the adoption of the Voting Rights Act, either the federal courts (acting to enforce the provisions of the United States Constitution or of the Voting Rights Act), or the Justice Department (acting pursuant to Section 5 of the Voting Rights Act), have rejected at least one statewide redistricting plan adopted by the legislature on the ground that the proposed plan diluted African-American voting strength.

In 1971, for example, a Louisiana federal court "whole-heartedly concurred with the findings of the Attorney General [under Section 5]" that the statewide legislative redistricting plan adopted by the Louisiana Legislature was racially discriminatory and held that it would have invalidated the plan for similar reasons, even if the Attorney General had not objected to its implementation. *Bussie v. Governor of Louisiana*, 333 F. Supp. 452, 454 (E.D. La. 1971), *aff'd and modified*, 457 F.2d 796 (5th Cir. 1971) (*per curiam*), *vacated sub nom. Taylor v. McKeithen*, 407 U.S. 191 (1972), *on remand*, 499 F.2d 893 (5th Cir. 1974). The *Bussie* court noted that "[d]uring the Twentieth Century only two [N]egroes . . . sat in the Louisiana Legislature, and even they did not sit at the same time. One succeeded the other." 333 F. Supp. at 457; see also *Hays* 1994 Tr., Vol. 4, at 24-25 (Brinkhaus testimony discussing presence of only one African-American in state legislature in 1968). After a decade of elections under the redistricting plan adopted by the legislature after the *Bussie* decision, 10 Louisiana

House districts and 2 Louisiana Senate districts had elected African-American candidates. Engstrom, *et al.*, at 111; *see also* U.S. Exh. 9 at 12-13 ¶ 19.

The state legislative redistricting plan adopted after the 1980 census reduced the number of Black-majority House districts from 17 to 14. The plan could not be implemented because of the Section 5 objection interposed by the Attorney General to the implementation of this retrogressive plan. *Id.* at 14-15, ¶ 23.

The New Orleans area districts in the Congressional redistricting plan adopted by the Louisiana legislature following the 1980 census were successfully challenged by African-American voters in *Major v. Treen*[21] and was replaced ultimately by a plan containing one majority-Black Congressional district. As set forth fully in the district court opinion in that case, the plan afforded African Americans less opportunity than whites to participate in the electoral process and to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act of 1965, as amended. In reaching its conclusion that the construction of the First and Second Districts in the plan violated Section 2, the court considered "as . . . one aspect of the totality of circumstances, the evidence that opposition to the creation of a majority black district was responsible, to a significant extent," for the adoption of the plan. 574 F. Supp. at 355 n.39.[22]

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[21]Bernadine St. Cyr (*amicus* herein) was one of the plaintiffs in the *Major v. Treen* case.

[22]The district court found that Governor Treen opposed the adoption of the plan originally supported by the legislature at least partially for racial reasons: "He denounced any legislative scheme which intentionally drew boundary lines so as to consolidate a

The *Major* court also noted the extremely irregular procedure used to adopt the plan:

> Both houses of the Louisiana Legislature . . . approved reapportionment bills [that provided for the creation of a majority-Black district in New Orleans and its environs]. . . . Upon learning of the action of the legislature, Governor Treen announced his intention to veto the . . . [plan] if finally passed. . . . A sufficient number of legislators changed their position in response to the threatened veto to assure the demise of the . . . [plan].

574 F. Supp. at 333. The Legislature then delayed appointment of a conference committee to consider alternatives to the abandoned reapportionment bill and instead, an all-white group of legislators and other "'interested' parties" met privately "in the sub-basement of the State Capitol" to develop a new redistricting plan. *Id.* at 334. The predictable outcome of the legislators' secret meeting was the abandonment of the concept of developing a redistricting plan containing a majority-Black district, and the substitution of the plan ultimately

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majority of one race within a single district. He . . . characterized [the creation of a majority-Black New Orleans-based district] as an attempt by the Louisiana Legislature to enact into law the discredited idea of proportional representation. . . . [However, the Governor's] concerns were restricted to the aggregation of *blacks* within one district; the coalescence of whites was not regarded as ominous so long as [the white incumbent congressman's] chances for re-election were maximized. . . . [Consequently, an Orleans Parish-based] district with 55% *white* population encountered no objection [from the Governor]." 574 F.Supp. at 333 (emphasis supplied). *Cf.* US J.S. App. at 10a-11a (objecting to creation of 55%-Black District 4 of Act 1, while adopting court-ordered plan with far more heavily concentrated white populations in every district except the *Major v. Treen* remedial district).

adopted by the Louisiana legislature ("Act 20"), which did not contain a single majority-Black district. *Id.* at 334-35. After Governor Treen expressed his approval of Act 20, an all-white conference committee, consisting of 3 state Senators (Hudson, Nunez and O'Keefe) and 3 state Representatives (Alario, Bruneau and Scott) voted 4 to 2 in favor of referring Act 20 to the full legislature for approval. *Id.* at 336-37.[23] Assessing the procedure which yielded the adoption of Act 20, the district court wrote:

> [R]ather than utilizing the routine mechanism of the conference committee following the House's withdrawal of its approval of the . . . [original redistricting] plan, the legislative leaders convened a private meeting. . . . Because all were aware that the conflicting objectives of the Governor and black legislators with respect to a black majority district could not be harmonized, the latter *were deliberately excluded from the final decision-making process*.

574 F. Supp. at 352 (emphasis supplied).[24]

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[23]The district court found that Governor Treen's opposition to the first legislatively supported plan was "predicated in significant part on [the plan's] delineation of a majority black district centered in Orleans Parish." 574 F. Supp. at 334. See also *infra* p. 20, text at n.25.

[24]While Governor Treen explained his opposition to the creation of a majority-Black congressional district as the product, *inter alia*, of his "concern . . . [about] racial polarization," 574 F. Supp. at 333, and his belief that African-American voting strength is actually enhanced in so-called influence districts, rather than in majority-Black districts, his early political record evinced minimal "concern" about fostering racial polarization in the electorate or enhancing African-American voting strength. The 1978 ALMANAC OF AMERICAN POLITICS stated that in 1964 and 1968 campaigns against New Orleans Congressman

It is striking that contemporary opposition to Act 1 (and its second majority-African-American Congressional district) sounded the same themes as in 1980. For example, state Representative Charles Bruneau, who criticized the creation of Louisiana's first majority-Black Congressional district in the 1980's on the ground that New Orleans "already ha[d] a nigger mayor, and [it] d[id]n't need another nigger bigshot,"[25] also opposed the adoption of Act 1. Apr. 18, 1994 Louisiana House of Representatives and Governmental Affairs Committee Hearing Minutes at 37. In response to Speaker Pro Tem Copelin's argument that District 4 of Act 1 essentially replicated the former Eighth Congressional District, once represented by (white) Congressman Gillis Long, Representative Bruneau replied, "Of course, Mr. Copelin, as we say, that was then and this is now." *Id.* at 46. *Cf.* US J.S. App. at 4a ("[V]arious witnesses asserted that District Four was inspired by 'the old Eighth' district thereby satisfying the concept of 'traditional' districting principles. . . . The 'old Eighth' . . . was crafted for the purpose of ensuring the reelection of Congressman Gillis Long . . . [whereas n]ew District Four was drafted with the specific intent of ensuring a second majority-minority Congressional district").

Hale Boggs, "Treen's big issue was Civil Rights: in 1964 he charged that Boggs secretly favored the Civil Rights Act of that year; in 1968 he used Boggs' support of the Civil Rights Acts of 1965 and 1966 [as campaign issues]."

[25] *See Nomination of William Bradford Reynolds to be Associate Attorney General of the United States; Hearings Before the Senate Committee on the Judiciary*, 99th Cong., 1st Sess. 440 (1985) (*reprinting* analysis of Section 5 submission prepared by Robert N. Kwan, Attorney, Voting Section, Civil Rights Division, United States Department of Justice).

The United States Attorney General objected under Section 5 of the Voting Rights Act to the implementation of both the Louisiana House and Louisiana Senate redistricting plans adopted by the Legislature after the 1990 census. U.S. Exh. 9, at 19, ¶ 29. Also in 1991, shortly before undertaking Congressional redistricting, the legislature reapportioned the statewide Board of Elementary and Secondary Education ("BESE") based on the 1990 census. There are eight elected members of the BESE. The legislature initially devised a plan which had only one majority-African-American BESE district, which prompted an objection under Section 5 by the Attorney General. *Id.*[26]

In sum, after this Court affirmed orders striking down direct and indirect restrictions upon African-American suffrage in Louisiana, as described in the preceding section, the Legislature repeatedly acted to fashion state and national legislative districts that would eliminate or minimize African-American voting strength. In a consistent pattern that continued virtually up to the very moment that the Legislature redrew the state's Congressional districts after the 1990 census, those dilutive plans were struck down by the federal courts or were denied preclearance under Section 5 of the Voting Rights Act by the Attorney General of the United States. The Legislature thus had more than enough evidence to support its conclusion that drawing yet another plan which diluted minority voting strength would be rejected by the Justice Department and/or challenged successfully in court.

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[26]Ultimately, an eight-member redistricting plan for the BESE which included two Black-majority districts was adopted by the Louisiana Legislature and precleared under Section 5.

The Legislature also knew that in each instance, the remedy for its dilutive districting had involved the creation of majority-Black electoral districts to afford African-Americans the opportunity to elect candidates of their choice, and that implementation of the remedies had mitigated the persistent underrepresentation of African Americans in Louisiana's state legislative delegations and on the BESE.

On these facts there is simply no support whatsoever for the "finding" by the court below that "the State did not have a basis in law or fact to believe that the Voting Rights Act *required* the creation of two majority-minority districts," US J.S. App. at 9a. Moreover, the evidence demonstrates that the Legislature was well aware that a "Red River" Congressional district markedly similar to the ultimate Fourth District in Act 1 had been maintained through the 1970's and 1980's. Refusal to follow the same districting principles after the 1990 census so as to create a second majority-Black district would almost certainly have resulted in either a Section 5 objection or a court challenge by the state's African-American voters. For these reasons, the holding by the court below that reference to the "old eighth" district was either a "pretext" for the Legislature's "specific [and unlawful] intent of ensuring a second majority-minority Congressional district," US J.S. App. at 5a, or was irrelevant because "the old eighth district was never challenged on constitutionality," *id.* at 18a (Shaw, J., concurring), is baseless.

C. *The Persistence of Racially Polarized Voting*

There is extensive evidence in the record of the persistent phenomenon of racially polarized voting in Louisiana elections, and of the degree to which white bloc

voting, combined with other features of Louisiana's election system, continues to impede African-American political participation and limit the opportunity for African Americans to elect candidates of their choice in the state.

Within the past decade, there have been repeated judicial findings that racially polarized voting continues to occur with regularity in Louisiana. For example, in a recent Section 2 case challenging some of Louisiana's judicial election districts, the district court observed that "[t]he expert witnesses of *both* sides . . . agreed that there is widespread racial polarization in voting in Louisiana," *Clark v. Edwards*, 725 F. Supp. at 296 (emphasis supplied). The *Clark* court also noted that "the fact that in 54 [elections analyzed] . . . white voters never voted even a plurality for the black candidate strongly indicates racial polarization of white voters." *Id.* at 297.[27] As a result of the compelling evidence of racially polarized voting, as well as other evidence presented by plaintiffs, the district court

> conclude[d] that across Louisiana . . . there is consistent racial polarization in voting . . . . [and the court is] convinced . . . that the white majority has . . . repeatedly [voted sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate] in Louisiana judicial elections.

Id. at 298-99.[28]

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[27]*See also id.* at 304 (finding a "state-wide pattern of racially polarized voting which . . . is 'pronounced and persistent'") (quoting plaintiffs' expert Dr. Richard Engstrom).

[28]The court also held that "both subtle and overt racial appeals . . . still do appear in some white-black campaigns." 725 F. Supp. at 299.

The State of Louisiana and the United States proffered similar evidence to the court below in defense of Louisiana Act 1. In his 1993 testimony before the lower court, Dr. Richard Engstrom stated: "[A]cross Louisiana, voting is racially polarized. . . . [I]t does not begin at one parish line and end at another parish line. It's a pervasive phenomenon within the State." Aug. 19, 1993 Tr. 73. Dr. Engstrom also testified concerning the many "inexorable zero[es]"[29] among the elected branches of government in Louisiana: "[T]here are no Black statewide elected officials in Louisiana . . . [e]lected from a statewide majority white electorate. . . . There have been no Blacks elected to Congress from Louisiana in this century in a district with a majority white voter registration . . . [and t]here have been no African Americans elected to the state legislature in Louisiana . . . this century from a district . . . in which a majority of the registered voters were white." *Id.* at 79-80.

The decision below does not address any of this evidence and instead fast-forwards to a color-blind society which unfortunately is far from the present-day reality of Louisiana.[30]

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[29]*See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

[30]For example, the court below wrote: "[W]e refuse to accept the explanation [for the configuration of District 4 in Act 1] that citizen response to issues such as education, crime and health care is driven by skin pigmentation." US J.S. App. at 10a. The difficulty with this analysis is that it permits no consideration in the redistricting process of common political interests which many African Americans share -- including because they have had the common experience of suffering from official Louisiana policies of racial discrimination -- even while recognizing that members of numerous other racial, ethnic, and religious groups may share common interests. Incredibly, the court suggests, as one basis for its conclusion that Act 1 is constitutionally deficient, that it breaks down barriers between such

D. *The "Totality of the Circumstances"*

This Court recently emphasized the importance, in deciding claims under Section 2 of the Voting Rights Act, of comprehensively assessing all of the facts. "In modifying § 2 [in 1982], Congress . . . endorsed our view in *White v. Regester* that 'whether the political processes are "equally open" [to minority voters] depends upon a searching practical evaluation of the "past and present reality,"'" *Johnson v. DeGrandy*, *supra* note 5, 129 L. Ed. 2d at 795 (citations omitted). Unlike the thorough analysis of the proof required by this Court's previous decisions and reflected in the *Clark* decisions, the ruling below cavalierly dismisses the evidence and misapplies the decisions of this Court in an effort to avoid careful consideration of what the record shows. The court below wrote:

> Defendants elicited testimony that the sordid history of unconstitutional treatment of black citizens in Louisiana prompted the State to tinker with district lines in order to ensure minority control at the polls. . . . What the defense failed to establish is where the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have failed to accomplish what the State now sets out to do. Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that . . . racially

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groups. *See* US J.S. App. at 17a ("District 4 includes North Louisiana English-Scotch-Irish, mainline Protestants, South Louisiana French-Spanish-German Roman Catholics, traditional rural black Protestants and Creoles. The district encompasses North, Central and South Louisiana, each of which has its own unique identity, interests, culture, and history") (Shaw, J., concurring).

> configured voting districts [are] warranted. *Croson* and *Bakke* dictate this result.

US J.S. App. at 10a. The court below does not explain how the continued debilitating effects of prior discrimination that were identified by the *Clark* court just four years ago,[31] long after passage of the 1964 and 1965 federal laws to which it refers, have been eliminated in a state whose redistricting efforts immediately prior to the measure attacked in this litigation prompted objections from the Attorney General. Nor does it identify any evidence presented by the appellees indicating that racial disparities attributable to prior discrimination have vanished from Louisiana. (There was none.) Contrary to the suggestion in the opinion below, the decisions of this Court do not "dictate" the result reached in this case. Unlike in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the federal courts have made repeated findings of racial discrimination, and of its continuing effects, that fully support the Louisiana legislature's action.

Writing just two years before the last decennial census, Chief Judge Parker observed: "If all of us voted without regard to race, the problem would be solved and there would be no claim of a . . . [Voting Rights Act] violation. That day does not yet seem to have arrived [in Louisiana]." *Clark*, 725 F. Supp. at 300. The Louisiana

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[31]"[H]istorical de jure and de facto restrictions on minority voting . . . [and] socio-economic factors" which reflected historic discrimination and the disparate economic and educational status of Black and white residents of Louisiana "have not been shown to have dissipated . . . [and] "still operate to discourage more blacks than whites from full [political] participation." *Clark v. Roemer*, 777 F. Supp. 471, 478 (M.D. La. 1991), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992).

legislature embarked on the task of developing a Congressional redistricting plan for the state only a few years later. It defies common sense and conflicts with the extensive evidence presented by the State and the United States below to conclude, as the district court did, that race has so quickly become an inconsequential factor or irrelevant matter to Louisiana's body politic.

Moreover, in light of the repeated violations of the voting rights of the State's minority citizens, it is patently unfair to assign responsibility for the race-consciousness of the post-1990 census Congressional redistricting to the state's very recent efforts to comply with the demands of the Voting Rights Act by enacting a Congressional redistricting plan that would fairly recognize African-American voting strength in the state and would not operate to minimize or cancel out the votes of nearly one-third of the population of the state. Finally, as we have earlier noted, the conclusion of the court below (that the Louisiana Legislature lacked any basis for believing that if it failed to adopt a Congressional districting plan containing two districts that would afford African Americans an equal opportunity to elect candidates of their choice, the Attorney General would interpose a Section 5 objection or African-American voters would bring a successful Section 2 suit challenging the plan) is simply untenable in light of the extensive history and continuing adverse impact of decades of state-sponsored discrimination against the African-American citizens of the State of Louisiana.

The decision below is particularly troubling because, as Dr. Richard Engstrom said to the lower court, the Louisiana Legislature's efforts to adopt a Congressional redistricting plan that complied fully with the Voting Rights Act of 1965 and to take a prophylactic approach to congressional redistricting, attempting to

accommodate the concerns of the state's African-American as well as its white citizens, "was a real aberration. . . . We have a history of not complying with the Voting Rights Act until forced to either by the Justice Department or by federal courts such as in Major versus Treen." Aug. 19, 1993 Tr. 100. The state of Louisiana should not be stymied in this earnest and long overdue overture towards remedying "the sordid history of unconstitutional treatment of black citizens in Louisiana," US J.S. App. at 9a.

CONCLUSION

The history of Louisiana is duplicated in most of the states that have had a background of discrimination in voting. In redistricting after the 1990 census, public officials in many instances made good faith efforts to comply with the interpretations of the statutory and constitutional requirements for reapportionment announced by this Court and the lower federal courts. In jurisdictions with a history of discrimination in voting and other areas, where minority voters were politically cohesive, and where there were established patterns of racially polarized voting that made it almost impossible for a submerged minority to be represented, officials shouldered their legal obligation to create districts that gave minority voters equal access to the political process and a fair opportunity to elect representatives of their choice.

The results of this effort were of great benefit not only to minority communities, but to the body politic as a whole. For the first time since the end of Reconstruction the delegations to the United States House of Representatives (from the affected states) were indeed representative. Legislative bodies at the local and

state levels similarly encompassed the interests of all of the electorate.

In short, governmental officials and their constituents relied on the holdings of this Court when they made the difficult decisions inherent in the redistricting process. They sought to follow the law as expressed in those decisions and the innumerable decisions of the lower courts enforcing them.[32] Unfortunately, in a number of instances litigants and lower federal courts have misread this Court's decision in *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d 511 (1993) as somehow undermining or even overruling *sub silentio* decisions such as *Thornburg v. Gingles*, 478 U.S. 30 (1986) that have given meaning and substance to the Voting Rights Act. This Court should make clear that the obligations of that Act as interpreted by the courts remain as clear as before. To do otherwise would result in:

> . . . serious inequity to those who have relied upon them [and] significant damage to the stability of the society governed by [their] rule . . . .

Planned Parenthood v. Casey, 505 U.S. ___, 120 L. Ed. 2d 674, 700 (1992).

For the foregoing reasons, the decision of the court below should be reversed.

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[32]*Cf.* Hon. George C. Pratt, Symposium, *The Supreme Court and Local Government Law, The 1992 Term*, 10 TOURO L. REV. 295, 454-55 (1994) (discussing general acceptance of legal framework in New York City and New York state redistricting after the 1990 census, based upon Judge Pratt's experience on panels hearing such cases).

Respectfully submitted,

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